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IN THE

Supreme Court of the United States

October Term, 1972

No. .....

THE RAINIER AVENUE CORPORATION,
a Washington corporation,
Petitioner,
v.
THE CITY OF SEATTLE,
a municipal corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

The Petitioner respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the Supreme Court of the State of Washington entered in this proceeding March 16, 1972.

OPINIONS BELOW

The opinion appealed from appears in 80 Wash. Dec.2d 362, 494 P.2d 996, (April 7, 1972). The opinion on a prior appeal appears in 76 Wn.2d 800, 459 P.2d 40 (1969). The opinion of the trial court is unreported, but appears in Appendix E.

JURISDICTION

The judgment of the Washington Supreme Court was entered March 16, 1972. A timely petition for rehearing was denied June 6, 1972 en banc without opinion. Appendix G. Rule 50 of Rules on Appeal[1] provides that the filing of such petition suspends the decision of the court until the cause is finally determined by order denying the petition for rehearing, and this petition was filed within ninety days of said order. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257 (3).

QUESTION PRESENTED

The question is: Did the Washington Supreme Court so far depart from the accepted and usual course of judicial proceedings as to call for exercise of this court's power of supervision when it reversed the trial court by constructing a theory based upon an issue of law and fact not raised by anyone until the opinion was rendered on a second appeal, and therefore without notice or opportunity to be heard or present evidence, in violation of its own rules and decisions, exceeding its constitutional jurisdiction and power, and which resulted in an arbitrary judicial taking or property by impressing private property with a public use without just compensation?

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

No statute is directly involved other than to show respondent's contention, and it is set forth in the statement of the case.

1. Rule 50, Rules on Appeal, RCW Vol. O, provides: "Every petition for rehearing shall be filed within thirty days after the opinion in the cause has been filed. No more than one petition shall be filed by the same party. The filing of a petition for rehearing shall suspend the decision of the court until the cause is finally determined."

The Fourteenth Amendment of the United States Constitution provides in part as follows:

> ". . .; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article IV, Sections 4 and 6 of the Washington Constitution provide:

> "Section 4. Jurisdiction. The supreme court shall have original jurisdiction in habeas corpus, and quo warranto and mandamus as to all state officers, and appellate jurisdiction in all actions and proceedings . . ."
>
> "Section 6. Jurisdiction of Superior Courts. The Superior court shall have original jurisdiction in all cases in equity and in all cases at law which involve the title or possession of real property . . ."

STATEMENT OF THE CASE

This action was brought in the Superior Court of the State of Washington in and for King County by petitioner as plaintiff against the City of Seattle. T. M. Elliott intervened but did not participate in either trial or appeal, and the judgment did not adjudicate his rights, if any, in the property in question.

The action sought to quiet title against any claim of the City of Seattle to vacated portions of Rainier Avenue, a main thoroughfare in the city, and Edmunds Place; streets which bordered "Columbia Park", and which had been dedicated in a plat filed in 1891 containing lots, streets, and "Columbia Park". The city answered, claiming some title or interest, and, as an affirmative defense, which was subsequently dropped, title by adverse possession.

The title or interest claimed by the city was particularized in answers to interrogatories, in two trial and appeal

briefs, and argument, as the *fee ownership* of the vacated streets by virtue of being the owner of a determinable fee of the adjoining park.[2] The city contended that Washington statute R.C.W. 35.79.040 applied, which provides:

> "If any street or alley in any city or town is vacated by the city or town council, the property within the limits so vacated shall belong to the abutting property owners, one-half to each."

The city never at any time contended, on trial or appeal, that it had an *easement* for park use in the vacated streets. The issue of whether or not the dedicator intended an easement was never raised through two superior court trials and two appeals to the Washington Supreme Court. It was raised, and decided, when the final decision was handed down by the supreme court, and appeared for the first time in the majority opinion.

The majority opinion, Appendix A, rejected the contentions of the city that by vacating the streets it became the owner in fee thereof, and sustained petitioner's contention that it owned the fee of the vacated street by well settled Washington law. Then, after confirming the conclusions of the trial court, and their own previous opinion on the first appeal, Appendix B, that petitioner, on the proofs submitted, was the fee owner, proceeded to impress the fee title with an easement for park use that was wholly unasked for by the city, never in issue between the parties, never presented to any court for consideration, and without

2. The City of Seattle's brief on the second appeal stated, p. 8, as follows: "The City never did, never has, and does not now contend that it obtained the fee title to the bed of the streets in the plat by reason of the (street) dedication. The City as representative of or trustee for the public bases its principal claim to the ownership of the property in dispute upon the fact that at the time the street was vacated it (the City) was the abutting owner (of Columbia Park) in whom title to the fee underlying the street lay in any event, subject only to the public easement for travel, removed by vacation." R. 55.

authority of law. The justification advanced was that it was "better public policy", and that:

> "Consideration should be given to the public interest in open spaces, recreation and other benefits of parks in metropolitan areas."

The judgment so rendered deprives petitioner of any use of the property whatsoever.

The first trial in March 1966 resulted in a judgment of dismissal, upon a challenge to the sufficiency of petitioner's evidence to establish a prima facie case of title. The Supreme Court of Washington reversed, holding that a prima facie case of title had been proved upon the evidence submitted, and upon the rule of law that a dedication of land to the public for street use gives the public only an easement for street purposes, with the dedicator, or his successors, retaining the underlying fee, which, upon vacation, revert to the dedicator, or his successors. The cause was remanded for a new trial and any evidence which would support the City's arguments. Appendix B.

At the second trial petitioner introduced the same documents into evidence and the superior court, upon findings, Appendix C, that the vacation of the streets terminated the easement and that they reverted to the dedicator and his successors, entered judgment, Appendix D, in favor of petitioner, quieting title as against any and all claims of the City of Seattle. The trial judge also found that the instruments introduced into evidence by the City of Seattle were not significant instruments in the chain of title. (The instruments were deeds by the dedicator of lots in the plat that did not abut the vacated streets in question.)

The trial judge, in his oral opinion, Appendix E, Record 57 at p. 42, stated:

"Well, I have read the briefs with a great deal of interest. I am satisfied that the plaintiff's position here is correct. I cannot convince myself that a city has an interest in the abutting properties that would enable it to claim this particular property, Greenacre, upon the vacation of the roadways.

"I am satisfied under the law that when Greenacre was vacated by the City, that title would revert to the dedicator or to his successors in interest. . . . The principals of law, I think, that apply here are pretty clear and compel the conclusion that upon the vacation of the streets that the fee title would go, as I say, to the dedicator or to the successors in interest."

The City of Seattle appealed upon the same theories that it had presented to the trial court, i.e., (1) that the dedicator had not reserved the fee to the streets in the dedication, or in deeds to lots within the plat; and, (2) that the city owned a determinable fee in the park qualifying it as an abutting owner to the street to whom title belonged upon vacation by virtue of the street vacation statute, R.C.W. 35.79.040, *supra*.

The Washington Supreme Court reversed the trial court's findings and judgment, not upon the theories and issues presented to the trial and supreme court, but upon an entirely new basis.

The majority opinion decided each issue contended for by the City of Seattle adversely to it and in accordance with petitioner's position on such issues, i.e., (1) that a dedicator need not make a reservation of the fee in property dedicated to public use in order to retain the underlying fee; and, (2) that the city was not the holder of a determinable fee interest in adjoining "Columbia Park", since the rule of law in Washington from the time it was a territory was that property dedicated to the public gave

an easement or right of user only, and not a fee interest.

But the opinion then reverses the trial court's conclusion, contrary to the trial court's finding[3] and judgment[4], by constructing a theory of "dual easement", stating:

> "The ultimate issue here is whether the dedicator *intended* to dedicate the park streets independently of the park or whether it was his intent — *and better public policy* — to recognize that the fee in the area covered by the vacated street is subject to two easements, a public easement for street purposes and a public easement for park purposes." (emphasis supplied); and
>
> "Consideration should be given to the public interest in open spaces, recreation and other benefits of parks in metropolitan areas."

The intent of the dedicator is a finding of fact which the supreme court was without jurisdiction or power to make, or substitute for the trial court's findings of fact; and conclusion of a legal issue which, by its own settled rules of decision, it should not have considered, since it had not been raised or presented to the trial court, or, for that matter, to the supreme court itself.

HOW FEDERAL QUESTION PRESENTED

The Petitioner filed a timely petition for rehearing, Appendix F. The federal question was presented in the petition for rehearing, which was the first and only opportunity to do so, as follows:

> "The raising of an issue by the Supreme Court not considered by the parties, contrary to its Constitutional authority and its own rules of decision, deprive (petitioner) of its property without due process of

3. "That the vacation of these streets terminated the easement for street purposes, and the streets reverted to the dedicator and his successors."

4. ". . . the plaintiff's title . . . is quieted as against any and all claims of the City of Seattle."

law, contrary to the Fourteenth Amendment of the United States Constitution.";

and the amendment was set forth. The petition stated:

"It is not easy to accept the thought that the protections of law have been denied petitioner by the highest judicial body of one's state; that the sanctuary for the protection and preservation of rights guaranteed under the Constitution has itself been the instrument of arbitrary deprivation of due process of law."

The petition for rehearing was denied without opinion, Appendix G.

REASONS FOR GRANTING WRIT

Rule 19 of this court sets forth the primary reason for granting review on Writ of Certiorari to the Washington Supreme Court as follows:

"The court has so far departed from the accepted and usual course of judicial proceeding as to call for an exercise of this court's power of supervision."

The majority did not accept the findings of fact entered by the trial court, nor did they reverse the trial court upon the issues presented. Finding and construing that the dedicator intended an easement for park use if the street use were ever vacated was a fact and issue which the appellate court was without jurisdiction to enter and constructed by it without legal authority.

Article IV, Sections 4 and 6 of the Washington Constitution provide:

"Section 4. Jurisdiction. The supreme court shall have original jurisdiction in habeas corpus, and quo warranto and mandamus as to all state officers, *and appellate* jurisdiction in all actions and proceedings . . ."

"Section 6. Jurisdiction of Superior Courts. The superior court shall have *original* jurisdiction in all cases

> in equity and in all cases at law which involve the title or possession of real property . . ." (Italics mine)

In addition, Civil Rules for Superior Court (adopted by the Supreme Court) provide that issues of fact shall be tried by the superior court which shall find the facts.[5]

That the Washington Supreme Court's jurisdiction is limited to appellate review (except for habeas corpus, quo warranto and mandamus) and that it does not have constitutional jurisdiction to substitute its findings for that of the trial court is probably the most settled rule of decisional law in Washington jurisprudence. *Thorndike v. Hesperian Orchards*, 54 Wn.2d 570, 343 P.2d 183 (1959) setting forth the rule, has been cited countless numbers of times in support of the rule.

That the Washington Supreme Court will not consider *an issue* not raised in the trial court is an equally well-settled rule of law. They have repeatedly ruled that issues not raised at the trial level will not be considered by them where raised for the first time on appeal, even where a litigant argues for a change in existing law.[6] It is to be noted that the city did not even raise this issue on appeal.

The dissenting justice, Hunter J., joined by Rosellini, J., states the reason simply and directly by, inter alia, the following:

> "The majority, in order to attain a desired result for the public benefit, has evolved a theory that was not considered by the trial court; that was not conceived

5. CR. 39. Trial by Jury or By the Court.
(B) By the Court. (1) Rule. Issues not demanded for trial by jury . . . shall be tried by the court; . . . CR 52. Decisions, Findings and Conclusions. (1) Generally. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state its conclusions of law. . . .

6. *State v. Reano*, 67 Wn.2d 768; 409 P.2d 853, 1966
In re Richard, 75 Wn.2d 208, 449 P.2d 809, 1969

> or considered by any of the parties to the action, and is wholly without any support of authority.";

and,

> "I feel the majority has not only violated a basic rule of this court in reversing a judgment upon a theory that was not raised in the trial court, but has been *extremely unfair* to the plaintiff in denying it the right to present its views as to the theory upon which this case has been decided against it. The *action of the majority*, in denying the plaintiff this opportunity is tantamount to the taking of property without due process of law." (Emphasis supplied).

When this case was before the Washington Supreme Court in 1969, the same evidence was before the court that it used upon the second appeal to construct the theory of easement, to-wit: the plat and the dedicatory language of the plat. If they were going to find an easement, albeit without legal authority, why did they not so find in 1969? Why did they at that time reverse the trial court (although committed to the rule that they sustain a trial court's judgment on any theory established[7]) and send Petitioner back for a second trial only to construct an easement upon the quieted fee title in the decision on the second appeal? As stated in the petition for rehearing, petitioner feels that it was thrown a "rope of sand" as referred to in *Truax v. Corrigan* 257 U.S. 312, wherein it was stated that state power could only be exerted under principles of right and justice, and that purely arbitrary and capricious exercise of power is at variance with those principles and is in violation of the Fourteenth Amendment of the United States Constitution.

It is unfortunate that there is not an intermediary federal court to which petitioner could apply for redress. But if the

7. *State ex rel Wicks v. Tumwater*, 66 Wn.2d 33, 400 P.2d 789, 1965

U.S. Supreme Court declines to hear this case (if it believes it to be meritorious) petitioner will have had no opportunity to present arguments to any court upon its claimed federal rights.

CONCLUSION

If our government is "of laws and not men" such principle should be particularly applied to the supreme court of a state when it renders a decision not only upon inadequate state grounds, but contrary to its own "law of the land", and which results in an arbitrary judicial taking of property.

The paramount importance of applying it to a supreme court of a state over any other state governmental body is that it is the unit of government having the final power to protect citizens from arbitrary power of government. When it itself becomes motivated for the "public interest", or "public policy", in disregard for its own rules of law, we have the final act of oppressive exercise of power. We then truly have a government of men, and not of law. If this body violates the structure of the law without any supervisory check, it makes a mockery and illusion of the guarantee of the 14th Amendment that no state shall deprive a person of property without due process of law.

Respectfully submitted,

JOHN F. RAYMOND
Attorney for Petitioner

APPENDIX A

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

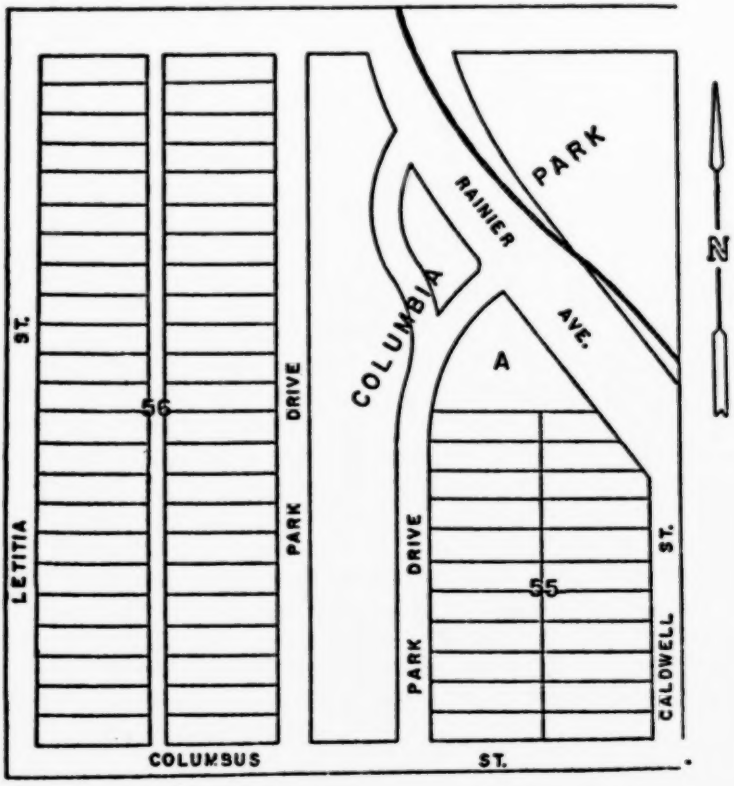
THE RAINIER AVENUE CORPORATION, a Washington corporation, *Respondent,* v. CITY OF SEATTLE, a municipal corporation, *Appellant,* T. M. ELLIOTT, *Intervenor.*	No. 41632 EN BANC FILED MARCH 16, 1972

NEILL, J.—This is the second appeal in a quiet title action wherein plaintiff/respondent claims vacated portions of streets as successor in interest of the dedicators of a plat.

The first appeal was from a dismissal at the conclusion of the plaintiff's case. *Rainier Ave. Corp. v. Seattle,* 76 Wn. 2d 800, 459 P.2d 40 (1969). We reversed and granted a new trial. At the second trial, judgment was entered quieting title to the subject property in the plaintiff. Defendant city of Seattle appeals.

The facts are detailed in the first appeal (*Rainier Ave. Corp. v. Seattle, supra*) and a brief summary will suffice for present purposes. In September, 1891, Frank D. Black and his wife, Kate, filed a plat of Columbia Supplemental No. 1, a subdivision in King County. The plat contained dedications for public uses, including Columbia Park, Park Drive (later named Edmunds Place), and a portion of Rainier Avenue. Rainier Avenue as platted followed a curving route through the subdivision. As originally platted, Columbia Park consisted of a substantial area traversed by Rainier Avenue and Park Drive (now Edmunds Place). A

sketch of the portion of the original plat reproduced here illustrates the juxtaposition of the streets and park or parks which are here involved and the lettering designating the park area.



In May, 1892, King County vacated the triangular area of Columbia Park lying northeast of Rainier Avenue. In 1912, the city of Seattle, having annexed the area, initiated a plan to realign and straighten Rainier Avenue. This resulted in condemnation of the southwesterly portion of the vacated part of Columbia Park and the vacation of a portion of Rainier Avenue as originally platted. Thus, present

Rainier Avenue includes a portion of Rainier Avenue as originally platted.

In 1957, the city of Seattle vacated Park Drive (Edmunds Place). The area here in dispute consists of the vacated portions of Rainier Avenue and the northerly portion of the west fork of vacated Park Drive (Edmunds Place).

Plaintiff originally relied upon two theories, to-wit: an "abutter's rights" theory and a "successor in interest to the dedicator" theory. It abandoned the abutter theory at the first trial. On the first appeal we remanded the cause for a new trial on the plaintiff's theory that it has succeeded to the dedicators' title by reason of mesne conveyances. The issue thus presented to the trial court, and now before us, of necessity involves a determination of the quantum of title held by the dedicators following the filing of the plat.

Upon retrial, the trial court found the evidence introduced by the plaintiff established a complete chain of title from the dedicators to the plaintiff and held that the vacated streets reverted to the dedicators and their successors in interest.

On this appeal the city contends that, as trustee in behalf of the public, it holds a determinable fee to the Columbia Park property abutting the disputed area; and that the vacated streets attach to the abutting park property.

In support of this contention, the city argues that the dedicators failed to reserve the fee to the streets in the dedicatory language of the plat; therefore, nothing passed to the successors in interest of the Blacks by the mesne conveyances. We do not agree.

No language is required in the dedication of streets for public use to reserve the fee to the dedicators. *Bradley v. Spokane & Inland Empire RR Co.*, 79 Wash. 455, 140 P. 688 (1914).

The city cites RCW 58.08.015 as authority for its contention that the park dedication granted a determinable fee to the city for the public use. The statute provides:

> Every donation or grant to the public, or to any individual or individuals, religious society or societies, or to any corporation or body politic, marked or noted as such on the plat of the town, or wherein such donation or grant may have been made, shall be considered, to all intents and purposes, as a quitclaim deed to the said donee or donees, grantee or grantees, for his, her or their use, for the purposes intended by the donor or donors, grantor or grantors, as aforesaid.

This statute does not purport to constitute a dedication as conveyance of a fee. The quitclaim deed referred to in the statute conveys only the interest intended by the donor or grantor. The statute does not alter the principle expressed in *Finch v. Matthews*, 74 Wn.2d 161, 167, 443 P.2d 833 (1968):

> Since *Burmeister v. Howard*, 1 Wash. Terr. 207 (1867), this court has not departed from the rule established in that case, that the fee in a public street or highway remains in the owner of the abutting land, and the public acquires only the right of passage, with powers and privileges necessarily implied in the grant of the easement. *Puget Sound Alumni of Kappa Sigma, Inc. v. Seattle*, 70 Wn.2d 222, 422 P.2d 799 (1967). This rule was applied specifically to a street dedicated to the public through the recording of a plat in *Schwede v. Hemrich Bros. Brewing Co.*, 29 Wash. 21, 69 Pac. 362 (1902).

We see no reason to adopt a different general rule as to dedications for parks purposes. It follows that absent an

intent to convey a fee, a dedication for public park purposes creates a public easement only. Nothing in this record shows such an intent; so we consider the city's title to the park area to be a public easement.

Even assuming, as was concluded by the trial court, that plaintiff is vested with the fee in the vacated streets, there remains the question of whether that fee is still encumbered by the easement created by the park dedication.

In construing a plat, the intention of the dedicator controls. This intention is to be deduced from the plat itself, where possible, as that furnishes the best evidence thereof. *Frye v. King County,* 151 Wash. 179, 275 P. 547, 62 A.L.R. 476 (1929). We further stated in *Frye* that, in construing a plat, we are not limited to consideration of words alone. Lines and designations appearing on the plat are also to be considered. *Cummins v. King County,* 72 Wn.2d 624, 434 P.2d 588 (1967). *Also see Mueller v. Seattle,* 167 Wash. 67, 8 P.2d 994 (1932). In this connection, it is to be noted that the plat designation of "Columbia Park" encompasses the dedicated streets.

It is also a salutory rule to resolve doubts against the dedicator, and within reasonable limits, to construe dedications so as to benefit the public rather than the dedicator. E. McQuillin, Municipal Corporations § 33.26 (3d ed. rev. 1964). *See Tsubota v. Gunkel,* 58 Wn.2d 586, 364 P.2d 549 (1961). *See also Schaller v. Town of Florence,* 193 Minn. 604, 259 N. W. 529 (1935).

The ultimate issue here is whether the dedicator intended to dedicate the park streets independently of the park or whether it was his intent—and better public policy—to recognize that the fee in the area covered by the vacated

street is subject to two easements, a public easement for street purposes and a public easement for park purposes. Under such latter construction, a vacation of the street easement leaves the fee subject to the easement for park purposes. The street vacation merely removes that particular burden and leaves the park unencumbered by the street easement, but still in existence as a park.

In apporaching the issue of the intent of the dedicator, we should be mindful of the observation made by John F. Dillon in his treatise *Commentaries on the Law of Municipal Corporations* § 1107 (5th ed. 1911):

> In closing our survey of this interesting title [Dedications] we may stop pausefully for a moment to note how impressively the doctrines of our jurisprudence concerning it illustrate their thorough and complete adaptation to the wants and exigencies of civilized society. To meet these, the ordinary rules of law relating to private rights have been modified and moulded by the public convenience and necessities . . . It may, we think, truly be affimed, that the doctrines of our law on this subject as fashioned and settled by judicial tribunals, though in many respects seemingly anomalous, are characterized by practical wisdom, and are beneficent in their operation. Rightfully applied they work no injustice to the supposed dedicator, since they draw the line with enlightened and considerate care between a just measure of his rights on the one hand and the rights of the public on the other.

Consideration should be given to the public interest in open spaces, recreation and other benefits of parks in metropolitan areas.

Applying the aforesaid rules to the plat and dedication before us, we conclude that the dedicator intended a single public park, incidentally traversed by access streets. A contrary intent could easily have been expressed in the dedica-

tion and reflected in the plat. The fact that both streets and park areas were platted is not, per se, inconsistent with our conclusion. That fact could as well reflect an awareness of a then existing problem in that several courts had held that, absent inclusion of streets at the time of platting the area, creation of through streets would be impermissible as not within the purposes of land dedicated for parks. *See* Annot., *To What Uses May Park Property Be Devoted,* 18 A.L.R. 1246, 1248 (1922).

In other ways, the plat and dedication indicate that the dedicator's intent was as we have concluded. The dedication speaks of a singular park, not three separate parks; and the plat designation of "Columbia Park" includes the entire area, traversed by the dedicated streets. We think it reasonable to resolve any doubts on this point, and under these circumstances, against the dedicator. The strong public interest in the maintenance of parks and open spaces in urban areas is thereby served, with no demonstrable harm to the dedicator's intent.

It follows that plaintiff's fee in the former street areas remains subject to the unabandoned and unvacated easement for park purposes which the city of Seattle holds for the benefit of the public.

Reversed and remanded.

s/ HALE, J.

We concur:

s/ HAMILTON, C. J.

s/ FINLEY, J.

s/ HALE, J.

s/ WRIGHT, J.

s/ RYAN, J. *pro tem*

HUNTER, J. (dissenting)—I dissent. The majority, in order to attain a desired result for the public benefit, has evolved a theory that was not considered by the trial court, that was not conceived or considered by any of the parties to the action, and is wholly without any support of authority.

The majority admits the theory upon which the trial court decided this case is correct in that the fee to the public street is in the successor in interest to the original fee owner, the dedicator of the plat. The majority holds, however, that the trial court did not go far enough in that it should have held a public easement for park purposes was in the public streets adjoining Columbia Park, which was lying dormant until the superimposed public easement for a street had been vacated. This theory was adopted without any language whatsoever for its support in the dedicatory language of the plat.

The rationale of the majority is simply that the existence of an underlying public use for park purposes in the public streets must have been intended by the plattors since the streets are running through the area in the plat designated as Columbia Park.

This is a *non sequitur*. The streets were carved out of the area designated as Columbia Park and their use was specifically enumerated in the dedicatory language of the plat:

> Know all Men by these presents: That we Frank D. Black and Kate H. Black, his wife, owners of the above described tract of land, being the E. ½ of N.W. ¼ of N.W. ¼ of Sect. 22 and the S.W. ¼ of N.W. ¼ of same Sect. 22 being in Twp. 24 N. Rg. 4 E.W.M. herein platted as "Columbia Supplemental No. 1 hereby declare this plat and hereby dedicate to the use

> of the public forever all streets, alleys, avenues, driveways, highways, public places and Columbia Park herein laid out on said plat, *except as herein reserved.* The said F. D. Black and wife especially reserves to itself, its successors and assigns all rights and privileges upon said streets, alleys, avenues, driveways, highways and public places to lay down maintain and operate railroads, street railroads, motorlines, electric lines, water pipes, gas pipes, telephone lines, telegraph lines, electric light lines and all electric wires *and all other rights*, franchises and privileges, save and except the right of the public to use said streets, alleys, avenues, driveways, highways and public places for foot passage, for horses and other animals, and for wagons, carriages, carts, buggies and other vehicles, save and except railway motor or electric lines or other tram way conveyances. It being the intent and purpose of this dedication to reserve all rights of public or quasi public franchise not herein expressly granted.

(Italics mine.)

There is no provision whatsoever for the use of the streets in any manner for park purposes, or any proviso by implication or otherwise that an underlying dormant easement for park purposes existed in the streets in Columbia Park to become activated into life in the event of the streets' vacation.

Rights to an interest in land can pass only by grant. In *Bradley v. Spokane & Inland Empire RR Co.*, 79 Wash. 455, 140 P. 688 (1914), we said:

> The title to the land included within the streets and alleys would only pass by grant, as title to the various lots would only pass by grant.

There is no semblance of a grant of an underlying easement for park purposes to the city. The law is well settled as to the resulting right of ownership upon vacation of a street. The established rule in this state was announced in the recent case of *Finch v. Matthews*, 74 Wn.2d 161,

167, 443 P.2d 833 (1968), cited by the majority. We there stated:

> Since *Burmeister v. Howard*, 1 Wash. Terr. 207 (1967), this court has not departed from the rule established in that case, that the fee in a public street or highway remains in the owner of the abutting land, and the public acquires only the right of passage, with powers and privileges necessarily implied in the grant of the easement. *Puget Sound Alumni of Kappa Sigma, Inc., v. Seattle*, 70 Wn.2d 222, 422 P.2d 799 (1967). This rule was applied specifically to a street dedicated to the public through the recording of a plat in *Schwede v. Hemrich Bros. Brewing Co.*, 29 Wash. 21, 69 Pac. 362 (1902).

Rowe v. James, 71 Wash. 267, 128 P. 539 (1912); *Bradley v. Spokane & Inland Empire RR Co., supra; Johnson v. Medina Improvement Club*, 10 Wn.2d 44, 116 P.2d 272 (1941).

In *Johnson v. Medina Improvement Club, supra*, we said, at page 56:

> By the weight of authority, where property dedicated to the public is abandoned or relinquished, the public's rights are terminated and the land by operation of law reverts to the dedicator.

See 11 E. McQuillin, Municipal Corporations § 33.66 (3d ed. rev. 1964) at 807.

The defendant city is not the owner of the fee to Columbia Park abutting the vacated streets and cannot therefore claim its ownership as an abutting owner. There being no provision in the plat for an easement in the street for park purposes, the land area of the streets upon vacation reverted to the abutting fee owner, the plaintiff in this case.

The defendant has made other contentions which need not be discussed in view of the disposition of this case

made by the majority. In any event they are, in my opinion, without merit.

I agree with the majority that it is for the public benefit that the city of Seattle have the right to use the vacated streets for park purposes; however, this objective should be accomplished by legislation as a required condition in the filing of a plat. In the instant case the city has the right of condemnation which can be exercised.

I feel the majority has not only violated a basic rule of this court in reversing a judgment upon a theory that was not raised in the trial court, but has also been extremely unfair to the plaintiff in denying it the right to present its views as to the theory upon which this case has been decided against it. The action of the majority, in denying the plaintiff this opportunity is tantamount to the taking of property without due process of law.

I would affirm the trial judge.

s/ HUNTER, J

s/ ROSELLINI, J.

APPENDIX B

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

THE RAINIER AVENUE CORPORATION, *Appellant*, v. THE CITY OF SEATTLE, *Respondent*, T. M. ELLIOTT (Intervenor), *Respondent*.	No. 39807 DEPARTMENT ONE FILED SEPT. 25, 1969

This is an action to quiet title to real property. It was tried to the court sitting without a jury. At the conclusion of plaintiff's evidence, the trial court granted a challenge to the sufficiency of its evidence. Plaintiff appeals, assigning error to the trial court's action.

In September, 1891, Frank D. Black and his wife, Kate, platted, as Columbia Supplemental No. 1, a large tract of land which they owned. It was outside but near the then corporate limits of the city of Seattle. The property involved in this action was included in the northerly portion of the plat. For reference purposes we have reproduced the following sketch:

The recorded plat, so far as relevant here, embraced dedications of land for public use, including Columbia Park, Park Drive (later named Edmunds Place), and a portion of Rainier Avenue. Rainier Avenue as platted (Rainier Ave. 1) followed a curving route through the plat as indicated by the dashed lines A-I and C-G. As originally laid out, Columbia Park consisted of the property identified by the heavily shaded border, including the triangular area in the northeast or upper right-hand corner of the sketch. However, in May, 1892, 8 months after the plat was recorded, King County vacated the triangular area of Colum-

A
B
C
D
E
F
H
I
Lincoln
Kinnee
Palmer Ave. Extension
Columbia Park
N

bia Park, exclusive of Rainier Avenue as then dedicated. The vacated area can be identified by referring to the heavily shaded dashed lines running between C-D-E-F-G-C on the drawing. We will hereafter refer to this triangular area as "blackacre."

In 1912, the City of Seattle, having annexed the area of the original platting, initiated action on a plan to realign and straighten Rainier Avenue. This resulted in a condemnation judgment, in early 1914, covering the southwesterly portion of blackacre reflected on the sketch by the oblong area within the lines between C-D-F-G and back to C. Rainier Avenue was then relocated (Rainier Ave. 2) along the route represented on the drawing as the area between the solid lines B-H and D-F. The realignment project of Rainier Avenue was completed by vacation, in late 1914, of that portion of Rainier Avenue as originally platted embraced within the outline formed by the area shaded by long lines sloping southwesterly-northeasterly on the sketch, within the oblong A-B-H-I-A. It will be observed that Rainier Avenue as relocated retains a portion of Rainier as originally platted (B-C-G-H-B).

Matters rested until 1957, when the City of Seattle vacated Park Drive (Edmunds Place). The area thus vacated included both northerly forks of Park Drive.

The area in dispute is reflected on the sketch by that portion which is cross-hatched, and consists of the westerly portions of Rainier Avenue as platted and vacated and the northerly portion of the west fork of vacated Park Drive (Edmunds Place). For convenience we will hereafter refer to this property as "greenacre."

At this point we pause to observe that, in ruling upon the challenge to the sufficiency of plaintiff's evidence, the trial court did not weigh the evidence but, rather, elected to treat plaintiff's evidence as true in all respects and granted to such evidence all reasonable inferences arising therefrom. The scope of our review, therefore, is limited to the same extent. The ultimate issue thus presented is whether the evidence, when viewed in its most favorable light, establishes a prima facie case in support of plaintiff's claim of an identifiable interest in greenacre. *N. Fiorito Co. v. State*, 69 Wn.2d 616, 419 P.2d 586 (1966); *Schmidt v. Pioneer United Dairies*, 60 Wn.2d 271, 373 P.2d 764 (1962).

In the trial court, plaintiff advanced two theories in support of its claim to an interest in greenacre.

The first is conveniently termed by the parties as the "abutter theory," and springs from plaintiff's acquisition of such interest as ownership of blackacre obtained in greenacre by the vacation of the area forming greenacre. Although tersely argued in plaintiff's brief on appeal, this theory was abandoned by plaintiff in oral argument before this court. We accordingly need not discuss it.

The second, referred to by the parties as the "successor of the platters theory," is predicated upon plaintiff's acquisition of the dedicators' (the Blacks) interest in greenacre through a succession of conveyances. Plaintiff rests its claim under this theory upon the rule to the effect that a dedication of land to the public for use as a street gives the public only an easement for use for street purposes, with the dedicator and his successors in interest retaining the underlying fee. Therefore, plaintiff contends, when the portions of Rainier Avenue and Park Drive forming green-

acre were vacated, greenacre reverted to the dedicators and their successors in interest.

In passing, we note that plaintiff's recitation of the underlying rule of law finds support in our cases. *Schwede v. Hemrich Bros. Brewing Co.*, 29 Wash. 21, 69 P. 362 (1902); *Bradley v. Spokane & Inland Empire R.R.*, 79 Wash. 455, 140 P. 688 (1914), *appeal dismissed*, 241 U.S. 639, 60 L. Ed. 1215, 36 S. Ct. 285 (1916); *Johnston v. Medina Improvement Club, Inc.*, 10 Wn.2d 44, 116 P.2d 272 (1941); *Finch v. Matthews*, 74 W.D.2d 163, 443 P.2d 833 (1968).

We turn then to the basis upon which the trial court concluded that plaintiff had failed to make a prima facie showing. Reference to the trial judge's oral decision reveals that the dismissal was predicated upon his belief that plaintiff had failed to establish a necessary link in its chain of title, particularly between the years of 1891 and 1916. Our examination of the record belies this belief.

The Blacks, it will be recalled, platted their property in 1891. Between 1891 and 1916, they conveyed some of the platted lots, including some abutting on Park Drive (Edmunds Place) to the south of greenacre. In 1916, a corporation was formed, Frank D. Black, Inc. The Blacks thereupon conveyed to the corporation all interests of any description in any real property which they then owned within the state. Later the corporation was dissolved and a liquidating trustee was appointed. In 1963, the trustee conveyed any interest of the corporation in greenacre to Philip P. Malone by quitclaim deed. Mr. Malone thereafter, in 1965, conveyed his interest to plaintiff.

To establish it was the Blacks' successor in interest, plaintiff called a title company representative. This witness

was asked what pertinent instruments were in the chain of title relating to any interest in greenacre. He testified that the instruments which directly affected a transfer of any interest in greenacre were: (1) the original plat; (2) the 1916 deed from the Blacks to Frank D. Black, Inc.; (3) the resolution for dissolution of Frank D. Black, Inc., and the appointment of the liquidating trustee; (4) the street vacation documents; (5) the 1963 conveyance from the trustee to Mr. Malone; and (6) the conveyance from Mr. Malone to plaintiff. These instruments were either introduced into evidence or their existence was stipulated to.

A reasonable inference can fairly be drawn from the testimony of the foregoing witness, and the record as it now stands, that there were no other significant instruments of record which materially affected disposition of the Blacks' interest in the vacated streets forming greenacre. Therefore, when viewed in the favorable light required, the record supports plaintiff's contention that the chain of title is complete and that it is the successor to the Blacks' interest in greenacre such as that interest might be. More evidence than is before us now is necessary to reach the merits of respondent's countervailing arguments.

The order of dismissal is reversed and the cause is remanded for new trial. Costs will abide the new trial.

s/ HAMILTON, J.

We Concur:

s/ HUNTER, C. J.

s/ FINLEY, J.

s/ WEAVER, J.

s/ MCGOVERN, J.

APPENDIX C

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

THE RAINIER AVENUE CORPORATION, a Washington corporation, *Plaintiff,* v. CITY OF SEATTLE, a municipal corporation, *Defendant,* T. M. ELLIOTT, *Intervenor.*	No. 620581 FINDINGS OF FACT AND CONCLUSIONS OF LAW

THIS MATTER, having come on regularly for trial February 11, 1970, and continuing to February 13, 1970, for the Court's oral decision, the Plaintiff appearing by their attorney, John F. Raymond, and the Defendant by the corporation counsel's office, G. Grant Wilcox of counsel, and evidence having been introduced by and on behalf of the Plaintiffs in support of their complaint and the Defendant in support of their Answer, and the Court having considered same and arguments of counsel and being fully advised in the premises, does now make the following:

FINDINGS OF FACT

I.

That the above parties were properly before the Court, and that the Court has jurisdiction over the parties and of the subject matter of this suit.

II.

That a plat of property in King County, Washington, the material portions of which that are in dispute here hereinafter described, was duly filed for record in 1891, at which time the fee title was vested in Frank D. Black and Kate Black, his wife. That the platted property included

streets dedicated to public use known as "Rainier Avenue" and "Park Drive", the name of the latter being changed to "Edmunds Place", and portions of which were later vacated by the City of Seattle under Ordinance Nos. 33601 and 86469, which vacated streets included the property in dispute between the parties as hereafter described.

III.

That the vacation of these streets terminated the easement for street purposes, and the streets reverted to the dedicator and his successors.

IV.

That the evidence introduced by Plaintiff established a chain of title from the dedicator to the Plaintiff.

V.

That the instruments introduced into evidence by Defendant were not significant instruments in the chain of title from the dedicator of the property in dispute in King County, State of Washington described as:

(a) Portion of Rainier Avenue South as platted in the plast of Columbia Supplemental No. 1 as recorded in Volume 8 of Plats, page 12, records of King County, Washington, and subsequently vacated by Ordinance No. 33601 described as follows: Beginning at the intersection of the south line of South Alaska Street and the westerly line of Rainier Avenue South as now established; thence southerly along said westerly line to its intersection with a line drawn northeasterly at right angles from a point on a line drawn northerly from the southwest corner of Lot 1536 said plat parallel with the westerly line of Rainier Avenue South, as platted in Columbia Terrace Addition, as recorded in Volume 10 of Plats, page 48, records of King County, Washington, distant 200 feet northerly of said southwest corner; thence westerly along said perpendicular line to the westerly line of said vacated street; thence

northerly along said westerly line to said south line; thence east along said south line to the beginning.

(b) Portion of vacated Edmunds Place South as platted in the plat of Columbia's Supplemental No. 1 as recorded in Volume 8 of plats, page 12, Records of King County, Washington as vacated by Ordinance No. 86469 lying westerly and northerly of a line described as follows: Beginning at the southwest corner of Lot 1536 said plat; thence northerly parallel with the westerly margin of Rainier Avenue South as platted in the plat of Columbia Terrace as recorded in Volume 10 of plats page 48, records of King County, Washington a distance of 200 feet; thence easterly at right angles to the westerly line of Rainier Avenue South as now established.

From the foregoing Findings of Fact the Court makes and enters the following:

CONCLUSIONS OF LAW

I.

That the Plaintiff is entitled to a Judgment quieting title in the property described in the Findings herein as against any and all claims of the City of Seattle.

DONE in open Court this 20 day of February 1970.

Presented by:

s/ JOHN F. RAYMOND

Approved for entry:

s/ STORY BIRDSEYE

Judge

APPENDIX D

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

THE RAINIER AVENUE CORPORATION, a Washington corporation, *Plaintiff,* v. CITY OF SEATTLE, a municipal corporation, *Defendant,* T. M. ELLIOTT, *Intervenor.*	No. 620581 JUDGMENT QUIETING TITLE

THIS MATTER having come on regularly for trial before the undersigned Judge of the above entitled Court on February 11, 1970, and continued to February 13, 1970 for the Court's decision, and the Court having considered the evidence introduced by Plaintiff and Defendant, and having entered Findings of Fact and Conclusions of Law, now, therefore, in accordance therewith:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Plaintiff's title in the following described real property in King County, State of Washington, is quieted as against any and all claims of the City of Seattle. Said property in King County, Washington being described as follows:

(a) Portion of Rainier Avenue South as platted in the plast of Columbia Supplemental No. 1 as recorded in Volume 8 of Plats, page 12, records of King County, Washington, and subsequently vacated by Ordinance No. 33601 described as follows: Beginning at the intersection of the south line of South Alaska Street and the westerly line of Rainier Avenue South as now established; thence southerly along said westerly line to its intersection with a line drawn northeasterly at right angles from a point on a line drawn northerly from the southwest corner of Lot 1536 said plat paral-

lel with the westerly line of Rainier Avenue South, as platted in Columbia Terrace Addition, as recorded in Volume 10 of Plats, page 48, records of King County, Washington, distant 200 feet northerly of said southwest corner; thence westerly along said perpendicular line to the westerly line of said vacated street; thence northerly along said westerly line to said south line; thence east along said south line to the beginning.

(b) Portion of vacated Edmunds Place South as platted in the plat of Columbia's Supplemental No. 1 as recorded in Volume 8 of plats, page 12, Records of King County, Washington as vacated by Ordinance No. 86469 lying westerly and northerly of a line described as follows: Beginning at the southwest corner of Lot 1536 said plat; thence northerly parallel with the westerly margin of Rainier Avenue South as platted in the plat of Columbia Terrace as recorded in Volume 10 of plats page 4,8 records of King County, Washington a distance of 200 feet; thence easterly at right angles to the westerly line of Rainier Avenue South as now established.

This judgment does not in any way adjudicate the rights of T. M. Elliott or his successors.

DONE in open Court this 20 day of February 1970.

Presented by:

s/ JOHN F. RAYMOND

Attorney for Plaintiff

s/ STORY BIRDSEYE

Judge

APPENDIX E

MORNING SESSION

February 13, 1970

9:30 A.M.

All parties present.

THE COURT: I wonder if there is anything else that you folks would like to say, anything you would like to add to your arguments, or do you think you covered it pretty well?

MR. RAYMOND: I think it was pretty well covered.

MR. WILCOX: I don't believe there is anything we can add.

THE COURT: I see. Well, I have read the briefs with a great deal of interest. I am satisfied that the plaintiff's position here is correct. I cannot convince myself that a city has an interest in the abutting properties that would enable it to claim this particular property Green Acre upon the vacation of the roadways.

I am satisfied under the law that when Green Acre was vacated by the City, that title would revert to the dedicator or to the successors in interest of the dedicator. I think it is rather significant perhaps that back in 1912 when the City wanted to acquire property just to the south of Green Acre, apparently for library purposes, that it thought it desirable to take a deed from Frank Black, who was one of plaintiff's predecessors in interest. Of course, this was inconclusive, but at least I think it indicates that at that time the City felt that Black did have some interest in the property adjoining Rainier Avenue on the west and property just to the south of what we now refer to as Green Acre.

The principles of law, I think, that apply here are pretty clear and compel the conclusion that upon the vacation of the streets that the fee title would go, as I say, to the dedicator or to the successors in interest. I don't think there is anything I can add to that.

Thank you, gentlemen, for your help with the problem.

MR. RAYMOND: Thank you, your Honor.

MR. WILCOX: Thank you, your Honor.

APPENDIX F

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

THE RAINIER AVENUE CORPORATION,
Respondent-Petitioner,

v.

THE CITY OF SEATTLE,
Appellant.

No. 41632
RESPONDENT'S PETITION FOR REHEARING
John F. Raymond
Attorney for Respondent-Petitioner

Respondent respectfully petitions the Court that the opinion and decision filed March 16, 1972 be withdrawn and there be reconsideration thereof.

This Petition is based on the following grounds:

1. The Supreme Court acted in excess of the power and jurisdiction of the court under the Washington Constitution in raising an "ultimate issue" that was not contended for by Appellant, nor presented to the trial court for determination, nor argued or presented to the Supreme Court for decision; and in making a Finding of Fact as to that "ultimate issue".

2. The portion of the opinion dealing with the "ultimate issue" denies to Respondent its right to an adjudication of their cause as presented by the record on appeal and the facts as established by the record.

3. The opinion is contrary to law insofar as the "ultimate issue" is used to reverse the judgment of the trial court.

4. The majority, by raising and basing their opinion on an "ultimate issue" not contended for, or presented to the trial court, or urged on appeal, rests upon an issue which Respondent had no notice of or opportunity to be heard, in deprivation of their right of access to the court and of their right of due process of law; all in violation of the U.S. Constitution, Amendment XIV.

ARGUMENTS IN SUPPORT OF PETITION

I. *The Supreme Court acted beyond its Constitutional jurisdiction:*

Article IV, Section 4, of the Washington State Constitution provides as follows:

> "Section 4, Jurisdiction. The Supreme Court shall have original jurisdiction in habeas corpus, and quo warranto and mandamus as to all state officers, *and appellate jurisdiction* in all actions and proceedings . . ."

The majority opinion determines the legal issues, which either party presented, in favor of the Respondent, to-wit: That Plaintiff's evidence established that it was the holder of the fee of the vacated streets, and that Appellants' contentions were without merit. How, then, was the majority able to reverse the judgment of the trial court? The answer is, as taken from the majority opinion:

> "The *ultimate issue* here is whether the dedicator *intended to dedicate* the park streets independently of the park or whether it was his *intent* . . . to recognize that the fee in the area covered by the vacated street is subject to two easements, a public easement for street purposes and a public easement for park purposes." (Emphasis supplied)

The "*ultimate issue*" referred to by the majority is an issue of fact. Frank D. Black's "*intent*" is not a legal issue; it is purely a question of fact. The majority then *finds* as a fact that Mr. Black *intended* two easements: one for street use, and one for park use in the event the street was ever vacated. It is not necessary to argue that there is no evidence, or inference from any evidence to support this finding, even though there isn't, for the reason that the Supreme Court is not a fact finding body in the exercise of its appellate jurisdiction.

It may have been possible for the Supreme Court to enter a Finding of Fact under the laws of 1893, Chapter 61, Section 21, providing that the Supreme Court would try *de novo* disputes of fact tried to the court below, but, as set forth in *Thorndike v Hesperian Orchards*, 54 Wash. 2d 570, even assuming the constitutionality of that statute, the statute was abrogated by the Supreme Court itself and thereafter expressly repealed by the legislature. In passing, the court noted that a similar statute in Wisconsin was held to be unconstitutional upon the hypothesis that the appellate jurisdiction of the Supreme Court was granted by the Constitution and it was beyond the province of the legislature to contract or enlarge it. The constitutional question was never raised during the life of the statute. However, the court in the *Thorndike* decision stated:

> "The findings are amply sustained by the proofs. If we were of the opinion that the trial court should have resolved the factual *dispute* the other way, the *constitution does not authorize this court to substitute its findings for that of the trial court.*" (Emphasis supplied)

In the twelve years that this decision has been in effect it has been cited more times than any other decision of the Washington Supreme Court to this writer's observation, approximately eighty times. Can there be any question that this is the law of the land? To the same effect, and clearly and simply stated, is the following from *Berger Eng. Co. v Hopkins*, 54 Wn. 2d 300,

> *"This court is not a fact-finding branch of the judicial system of this state. The constitution does grant to this court the power to review the trial court's findings.* Our appellate review is limited to ascertaining whether the evidence sustains the findings or clearly preponderates against them." (See: *Fisher v. Nicklin*, 51 Wash 2d 518)

Exceeding the limits of constitutionally given power and jurisdiction by the Supreme Court was the subject of discussion in *In re Elliott*, 74 Wn. 2d 600. The majority in that case faced the question and judicially determined that the Supreme Court had jurisdiction. The significance of such a determination can perhaps be measured by the lengths of the opinions expressed, but more adequately by some random quotes from Justice Hale's dissent.

> "The Supreme Court came into being with all power and capabilities essential to the exercise of an appellate, revisory and a specified original jurisdiction—along with certain inherent powers traditionally said to belong to court . . . ordained by the constitution to execute that portion of the people's sovereignty known as the judicial power. Endowed by the people with adequate authority to fulfill its functions under the constitutions of the state and of the United States and to carry out the judicial power, the Supreme Court has neither a surplus of power nor a deficiency thereof to trespass or be trespassed upon the executive or legislative branches of government . . .
>
> It is this separation of powers, the division of all authority of governmental into the executive, legislative and judicial and the allocating to each its appropriate share of the peoples sovereignty which, perhaps even more than the Bill of Rights, has been the greatest bastion of individual liberty and national strength yet devised."

The dissent recognized that the result reached by the majority was a legislative function, not judicial.

II. *That portion of the opinion dealing with the "ultimate issue" denies to Respondent its right to an adjudication of their cause on the record and facts established by the record.*

The facts of this case, as between the parties, have never been in serious dispute. The parties stipulated and agreed

to many of the facts. In the City of Seattle's brief upon the first appeal, the City accepted the statement of the case, supplemented by explanation of a fold out map in their brief. The same facts stipulated to on the first trial, were stipulated to on the second trial, and in Respondent's brief upon the second appeal stated:

> "The Respondent accepts appellant's statement of the case."

The Appellant stated, in their brief on the second appeal:

> "This court's summation in *Rainier Ave. Corp. vs. Seattle*, 76 Wash. 2d 800, of the facts as far as the first trial progressed has been adopted by the appellant and for convenience is set forth herein."

Thus, both parties, and the Supreme Court, were in substantial accord as to the facts. The Supreme Court opinion detailed the pertinent evidence and testimony, and stated:

> "A reasonable inference can fairly be drawn from the testimony of the foregoing witness, *AND THE RECORD AS IT NOW STANDS*, that there were no other significant instruments of record which materially affected disposition of the Black's interest in the vacated streets forming Greenacre." (Emphasis supplied)

The Court remanded for a new trial for more evidence to reach the merits of the City of Seattle's arguments. Those arguments, in essence, were: (1) That the dedicator had not reserved the fee to the streets or park in the dedication, as illustrated in his subsequent conveyances of property within the plat; (2) That the dedication of the park qualified the City of Seattle as an owner within the meaning of the abutting owner statute.

The trial court entered a Finding of Fact that "the vacation of these streets terminated the easement for street purposes, and the streets reverted to the dedicator and his successors."

By manufacturing an "ultimate issue" i.e., the intent of the dedicator to recognize that the street which he dedicated as a street was impressed with a public easement for park purposes, the majority has gone outside and beyond the record on appeal. There is not one shred of evidence that such was the intent of Frank D. Black; nor, is there anything in the record to indicate a request by Appellant that the trial court make such a finding of fact. This "fact" is a product only of the ingenuity of the majority to reach a result which they desire.

Reason for Decision

This brings us to the real reason why the majority reversed the trial court. Having no evidence, or contention by appellant, or authority, to support a finding of a dual easement, the majority states that the ultimate issue, other than the dedicators' intent, is whether it is *better public policy* to cover the fee of a vacated street with a public easement for park purposes, and states in support thereof that "we should be mindful of the observation made by John F. Dillon in his treatise *Commentaries on the Law of Municipal Corporations.*"

Mr. Dillon's observations are rather frightening, particularly in view of the instant case, when he states how impressively the doctrine of our jurisprudence adapt to the wants of civilized society *by modifying the rules of law for the public convenience,* and, while seemingly anomolous, the practical wisdom of judicial tribunals, who are beneficent in their operation, work no injustice because they draw the line with enlightened care between individual rights and the rights of the public.

The majority then state that "consideration should be given to the public interest in open spaces, recreation and other benefits of parks in metropolitan areas."

Black's Law Dictionary, 3rd Ed., states:

> "Public policy *properly* cognizable by courts is that derived or derivable by clear implication from its Constitution, statutes, and judicial decisions."

The problem of getting into public policy in this case as announced by the majority is threefold: (1) It is contrary to the law and Constitution; (2) the land in question is not now, and never has been, any part of Columbia Park, as contemplated by the dedication; it is only a 60 by 200 feet piece of vacated *street!* (3) that it would not be for the best benefit of the public.

Fifteen years ago the little business community surrounding Columbia Park was dead and dying, like so many urban areas that federal and state urban development programs have attempted to revive. Three of the gentlemen who later formed the Rainier Avenue Corporation had offices in the business area, one of whom was born there and still lives there. All were vitally interested in the welfare of the local community and active in local community affairs. Through efforts initiated by them, one of the streets in the plat now before the court was vacated and a local bank and supermarket attracted to the area to put up new buildings, as well as a developer who placed a modern office building now housing primarily professional people. No part of Columbia Park was touched. These gentlemen planned to construct an additional professional building on the property in question, as well as provide the present library with much needed additional space (without expense to the library), and have already expended a considerable sum for landscape architecture to beautify Columbia Park (also, without expense to the Park Department). Respondent feels that the public comprising Columbia City stand to be the losers if the majority opinion stands.

III. *The opinion is contrary to law insofar as the "ultimate issue" is used to reverse the judgment of the trial court.*

Reference is made to Civil Rules for Superior Court, nos. 38, 39, and 52; which, inter alia, provide that a trial is the judicial examination of the issues *between the parties;* that issues not tried by jury shall be tried by the court (superior court); and that the court (superior court) shall find the facts specially. These things were accomplished in the instant case. The fact finding procedure authorized by the Constitution and laws of the State of Washington afforded both parties with a full and fair hearing on all issues for which they each sought a determination.

On the issues contended for by appellant, the majority opinion disposes of them in favor of respondent. On the issue raised by the majority, i.e., the intent of the dedicator to recognize that the fee of the vacated street is encumbered by an easement for park purposes, reference to appellant's brief on appeal clearly demonstrate that appellant not only did not so contend, but took an exactly opposite position. The majority finds that the dedicator intended a park use in the streets if they were ever vacated, but appellant states, on p. 20 of their brief:

> "Appellant never did, never has, and does not now contend that it obtained fee title to the bed of the streets in the plat *by reason of the dedication.* The City bases its claim to the ownership of the property in dispute on the fact that at the time the street was vacated it was the abutting owner (of Columbia Park) in whom title to the fee underlying the street lay in any event, *subject only to the public easement for travel, removed by vacation.*"

INTENT OF DEDICATOR AS AN ISSUE

The appellant thoroughly considered the plat, the dedicatory language, and the intent, or lack of it, in raising

issues for consideration. In fact, one of the two principal issues raised by appellant is that the dedicator *did not intend* to reserve a fee in the streets when he dedicated the plat. (See pages 10, 12, 13, 14, and 18 of appellant's brief on appeal.)

The majority opinion overlooks the significance of a portion of the record that bears directly on the dedicator's intent, and since his intent, as found by the Supreme Court, was not an issue between the parties, no argument was presented to the Court on the subject by respondent. However, in answer to the conclusion by the majority, reference is made to Exhibits 21 and 22, being the deeds from Frank D. Black to the City of Seattle so that a library could be constructed. The property conveyed consisted of portions of Columbia Park and of Park Drive to then existing Rainier Avenue. There is nothing in the record showing a conveyance to the city of the portion of vacated Rainier Avenue upon which sits the library building. Why? Because there is no conveyance of the vacated street. The vacated street went to the City by virtue of its being the abutting owner, and it was the abutting owner because Black had conveyed the fee to the park and the street abutting the portion of Rainier Avenue about to be vacated. Notice that the deed (Exhibit 22) does not convey Rainier Avenue. When the City then vacated Rainier Avenue, they vacated only the street—not the street AND park easement!

Appellant itself recognized the significance of the deed from Black, as did the trial court, by arguing in its brief on pages 11 and 12 that the purpose of the deed was to obtain a release of the park property from the park use; but in the very same paragraph, they refer to the vacated

street, AND IT WAS NOT NECESSARY TO OBTAIN A RELEASE OF A "PARK USE" IN THE STREET WHICH WAS VACATED FOR THE VERY SIMPLE, OBVIOUS REASON THAT BLACK HAD NOT INTENDED A PARK USE IN THE STREETS!

FINDINGS & ISSUES ON APPEAL

In deciding this case upon a factual issue not presented to the trial court, which was not specifically set forth in appellants' brief verbatim or presented in any manner on appeal, and in the face of the rule that this court will accept as verities the trial court's findings if supported by the evidence, the majority opinion does violence to its own stated rules of law and decisions. Although it seems lugubrious, the following are submitted for the court's reconsideration of its majority opinion:

> *ROA I-42.* No alleged error of the Superior Court will be considered by this Court unless the same be definitely pointed out in the "assignments of error" in appellant's brief. In appeals from all actions at law or in equity tried to the court without a jury, the findings of fact made by the court will be accepted as the established facts in the case unless error is assigned thereto. No error assigned to any finding or findings of fact made or refused will be considered unless so much of the finding or findings as is claimed to be erroneous shall be set out verbatim in the brief. . . .

In *Richards v. Tyee Lbr. & Mfg. Co.*, 62 Wn. 2d 168, the Court stated:

> "The record also fails to show that the theory now argued by the defendant was ever presented to the trial court in any form. Nowhere does it appear that the trial court was asked to pass on the question whether . . . As we have consistently stated, we do not review the trial court's actions as to questions not brought to its attention."

An objection based on a theory not presented to the trial court cannot be raised for the first time on appeal. *Titus v. Tacoma Smeltermen's Union*, 62 Wn. 2d 461.

The Supreme Court will not consider on appeal issues not raised in the assignments of error. *Schneider v Forcier*, 67 Wash. 2d 161.

In *State v. Reano*, 67 Wash. 2d 768, the following rules of law are set forth:

"(1) The Supreme Court will not review a case on a theory different from that on which it was presented at the trial level, or consider questions not raised in the trial court.

(2) The precise point upon which an appellant relies for reversal must have been brought to the attention of the trial court and passed upon.

(3) If there is substantial evidence to support a trial court's finding of fact they will not be disturbed on appeal. The Supreme Court does not sit to retry factual issues."

Issues not raised in the trial court will not be considered on appeal. *Cement Dist. Inc. v W. Aggregates*, 68 Wash. 2d 640.

In *In re Richard*, 75 Wash. 2d 208, the court stated:

> "We have consistently followed the rule that issues not raised at the trial level may not be raised for the first time on review before this court . . . An exception to this rule arises only where the claimed error is so serious as to deny a criminal defendant a fundamentally fair trial or invade a basic constitutional right."

UPHOLDING THE TRIAL COURT JUDGMENT

It is submitted to the Court that one of the most important rules of law, insofar as this petition is concerned, is as set forth in *Shultes v. Halpin*, 33 Way. 2d 294, where at page 305 the Court states:

> "In our approach to this case as presented on the appeal, we have in mind the generally accepted rule that, in the review of a judgment of the trial court based upon findings made by that court, the respondent is entitled to the benefit of all evidence, and the reasonable inferences therefrom, in support of his judgment; and, in its scrutiny of the record, the appellate court will consider only the evidence most favorable to the respondent, and will eliminate from consideration all evidence contrary thereto or in conflict therewith." See also, *State ex rel. Weiks v. Tumwater*, 66 Wash. 2d 33, where it was stated: "We are committed to the rule that we will sustain the trial court's judgment on any theory established by the pleading and supported by the proof." See also, *Guerin v. Thompson*, 53 Wash. 515; *Lundgren v. Kieren*, 64 Wash. 672.

This case is not in the category of those cases where the findings are not explicitly sufficient to support a judgment. The findings of fact entered by the trial court follow exactly the Supreme Court decision of this case on the prior appeal. The rule, supported by the weight of authority is that, where the findings of fact are silent upon a material point, it is deemed to be found against the one having the burden of proof. *Ingle v. Ingle*, 183 Wash. 234.

It is submitted to this Court that that portion of the majority opinion dealing with the issue of the dedicator's intent be withdrawn under authority as is set forth in *Gordon v. Hillman*, 102 Wash. 411, and that the judgment of the trial court be affirmed.

IV. *The raising of an issue by the Supreme Court not considered by the parties, contrary to its constitutional authority and its own rules of decision, deprive respondent of its property without due process of law, contrary to the Fourteenth Amendment of the United States Constitution.*

Amendment XIV to the U.S. Constitution provides as follows:

> "... no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Where a party has not been fully heard in the regular course of judicial proceedings, and the decision is gross and obvious, coming close to the boundary of arbitrary action there can be a violation of the guarantee of the individual against the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice. Every state official, high and low, is bound by the XIV Amendment. The inhibition includes all functionaries of state government, judicial as well as political. See *16 Am. Jur.* 2d 542-548.

The historical reasons for the United States Constitution, a document which in its essence is one of defining and limiting powers, are as alive today as they were two hundred years ago. Colonists who had fled from and lived under the arbitrary and capricious oppression of the crown drafted an instrument that would permit citizens to live under a government of law, and not of men.

It is not easy to accept the thought that the protections of law have been denied the Respondent by the highest judicial body of one's state; that the sanctuary for the protection and preservation of rights guaranteed under the Constitution has itself been the instrument of arbitrary deprivation of due process of law. Counsel has had to search mind and conscience, and must be guided by CPE 15:

> "The lawyer owes the entire devotion to the interest of the client, . . . to the end that nothing be taken or withheld from him, *save by the rules of law, legally applied.* No fear of judicial disfavor . . . should restrain him from the full discharge of his duty."

The last sentence in Respondent's brief on appeal stated: "The real danger in this case is that a *city* has attempted to deprive an owner of private property contrary to constitutional safeguards and protections, and lawful means, under the insidious guise of 'public policy.'" Respondent was mistaken; the real danger was that the Supreme Court, under the guise of "public policy", would actually deprive an owner of private property contrary to constitutional safeguards and lawful means.

CJE 20 provides:

> "A judge should be mindful that his duty is the application of general law to particular instances, that ours is a government of law and not of men, and that he violates his duty as a minister of justice under such a system if he seeks to do what he may personally consider substantial justice in a particular case and disregards the general law as he knows it to be binding on him . . . He should administer his office with a due regard to the integrity of the system of the law itself, remembering that he is not a depositary of arbitrary power, but a judge under the sanction of law."

Quoting from Justice Weaver's dissent in *In re Elliott*, supra:

> ". . . In those after years when this case, elevated to high authority by the cold finality of the printed page, is quoted with the customary 'It has been said,' perchance another Court will say, 'Mayhaps the potter's hand trembled at the wheel.' Possibly when that moment comes these words may give that Court a chance to say, 'Yea, and a workman standing hard by saw the vase as it cracked.'"

The most difficult thing to understand about the majority opinion is the clear cut opinion rendered upon the first appeal. This case has now been in the courts for eight years. The Court had the plat, the dedicatory language, the evidence, and the same issues before it in January 1969. This Court remanded for "more evidence" from the City of Seattle, which the trial court found as a fact "were not significant instruments in the chain of title." Respondent feels that rather than receiving a clear-cut opinion of the legal issues, they were thrown a "rope of sand", as referred to in *Truax v. Corrigan*, 257 U.S. 312, wherein the United States Supreme Court ruled that State power could only be exerted under principles of right and justice, and that purely arbitrary and capricious exercise of power, where wrongful and amounting to a harmful invasion of property rights, is at variance with those principles and is violation of the 14th Amendment of the U.S. Constitution.

CONCLUSION

In conclusion, Respondent again respectfully urges the Court to reconsider that portion of its majority opinion dealing with the "ultimate issue" and public policy, and enter judgment upholding and confirming the judgment of the trial court. *Gordon v. Hillman*, supra.

Respectfully submitted,

s/ JOHN F. RAYMOND
John F. Raymond
Attorney for Respondent

APPENDIX G

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

THE RAINIER AVENUE CORPORATION, *Respondent*, v. THE CITY OF SEATTLE, *Appellant*.	No. 41632 ORDER DENYING PETITION FOR REHEARING

The Court having considered the respondent's petition for rehearing herein together with the appellant's answer thereto,

It is ordered that the petition be and it is hereby denied.

Dated this 6th day of June, 1972.

By the Court:

s/ ORRIS R. HAMILTON
Chief Justice